

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	
)	
BERT SMITH IV D/B/A)	DIVISION OF WATER
B4 CATTLE COMPANY INC.)	POLLUTION CONTROL
)	
RESPONDENT)	CASE NUMBER WPC08-0100

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed director of the Division of Water Pollution Control by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "division" and the "department" respectively).

II.

Bert Smith IV D/B/A B4 Cattle Company, Inc., (hereinafter the "Respondent") is the owner of property located on Holly Grove Road in Marshall County (hereinafter the "site"). Service of process may on the Respondent at 2792 Gold Road, Lewisburg, Tennessee 37091.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the "Act"), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act.

Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined by T.C.A. § 69-3-103(20) and, as herein described, has violated the Act.

VI.

Dry Branch, described herein, is “waters of the state”, as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

VII.

T.C.A. § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Further, the state requires a National Pollutant Discharge Elimination System (NPDES) permit for the

operation of a Class II Concentrated Animal Feeding Operation (CAFO). Coverage under the NPDES - Class II CAFO may be obtained by submittal of a Notice of Intent (NOI).

FACTS

VIII.

On February 12, 2008, division personnel conducted a site investigation and noted that a CAFO was in operation, most of the site was devoid of vegetation and that Dry Branch flowed through the length of the site. Division personnel spoke with the Respondent who stated that the site consisted of 60 acres and that 700 head of cattle were being fed. The Respondent indicated that he was in the process of obtaining a CAFO permit with the assistance of the Natural Resources Conservation Service (NRCS).

IX.

On March 4, 2008, the division issued a Notice of Violation to the Respondent for operating a CAFO without a permit. The Respondent was instructed to immediately remove the cattle from the site until such time as permit coverage was obtained and effective Best Management Practices (BMP) had been implemented

X.

On March 24, 2008, the NOV was returned to the division as unclaimed. The NOV was then sent a second time on March 26, 2008, via both regular mail and certified return receipt requested.

XI.

On April 1, 2008, division personnel returned to the site in order to obtain water samples from Dry Branch, upstream and downstream of the site. Analytical sample results received from the Tennessee Department of Health – Laboratory Services indicated concentrations of 1,100 CFU/100 ml for *E. Coli* and 9,000 CFU/100 ml for *Fecal Coliform*. Analytical results for the downstream location were 10,200 CFU/100 ml for *E. Coli* and greater than 120,000 CFU/100 ml for *Fecal Coliform*, constituting a condition of pollution.

XII.

On April 15, 2008, the NOV sent via certified return receipt requested was returned to the division as unclaimed. To date, the NOV sent via regular mail has not been returned to the division nor has the Respondent contacted the division.

VIOLATIONS

XIII.

By failing to obtain coverage under a NPDES - Class II CAFO permit, the Respondent has violated T.C.A. Sections §§ 69-3-108(b) and 69-3-114(b) which state in part:

T.C.A. § 69-3-108(b)

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or

bacteriological properties of any waters of the state in any manner not already lawfully authorized;

(6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

T.C.A. § 69-3-114(b)

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XIV.

By causing a condition of pollution in the Dry Branch, the Respondent has violated

T.C.A. Section 69-3-114(a), which states:

§ 69-3-114(a)

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XV.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondent.

1. The Respondent shall immediately discontinue feeding operations at the site until such time as coverage under the Tennessee General National Pollutant Discharge Elimination System Permit for Class II Animal Feeding Operations, has been issued by the division.
2. The Respondent shall, within 30 days of receipt of this Order, submit a NOI and supporting documents requesting coverage under Tennessee General National Pollutant Discharge Elimination System Permit for Class II Animal Feeding Operations. These documents shall be submitted to CAFO Notice of Intent, Tennessee Department of Agriculture, Ellington Agricultural Center, Nashville, Tennessee 37204 and to the Water Pollution Control, Permit Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.
3. The Respondent shall pay a CIVIL PENALTY of TWELVE THOUSAND FIVE HUNDRED DOLLARS (\$12,500.00) to the division, hereby ASSESSED to be paid as follows:
 - a. The Respondent shall, within 30 days of receipt of this ORDER, pay a CIVIL PENALTY in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00).
 - b. If the Respondent fails to comply with Part XV, item 1 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.
 - c. If the Respondent fails to comply with Part XV, item 2 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.


The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this ORDER AND ASSESSMENT. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing ORDER AND ASSESSMENT is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER AND ASSESSMENT will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this

8th day of May, 2008.



Paul E. Davis, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

T. C. A. §§ 69-3-109 and 69-3-115, allow any Respondent to secure review of this ORDER AND ASSESSMENT. To secure review of this ORDER AND ASSESSMENT, the Respondent must file with the director at the address below a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this ORDER AND ASSESSMENT.

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Unit, Tennessee Department of

Environment and Conservation, 14th Floor L & C Tower, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.